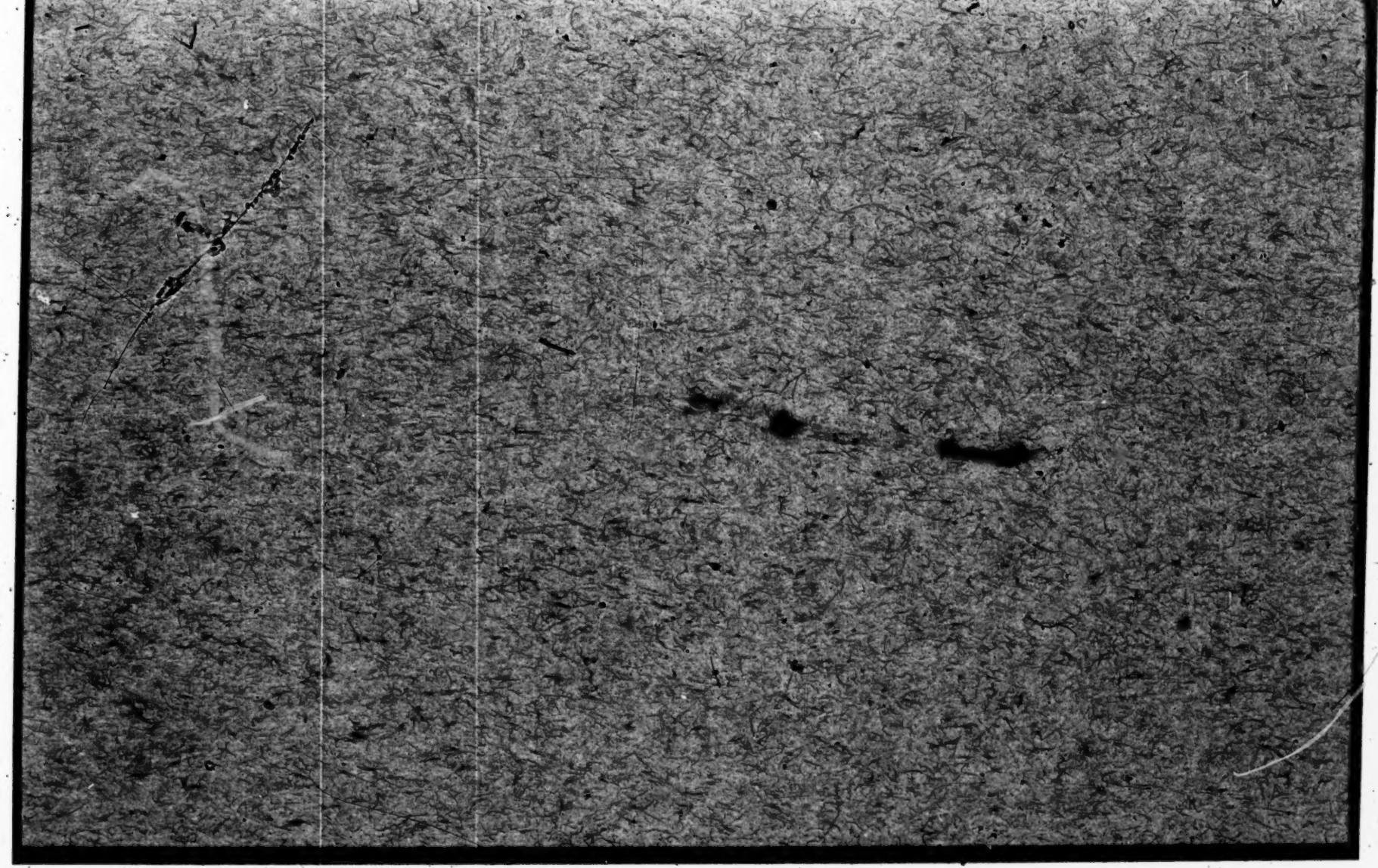

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 627

THRIFTIMART, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury-waived trial in the United States District Court for the Central District of California, petitioners, a wholesale groceries corporation and three of its employees, were convicted of violating 21 U.S.C. 331(k) and 333(a), on the basis of the fact that food in four company warehouses was found, upon inspection, to be infested with insects. They were sentenced to pay fines ranging from $100 to $750. The court of appeals affirmed the conviction (Pet. App. C).

405-624—70

The principal issue raised by petitioners here, as in the court below, relates to the validity under *See* v. *City of Seattle*, 387 U.S. 541, and *Camara* v. *Municipal Court*, 387 U.S. 523, of their consent to the inspections by Food and Drug Administration agents of their warehouse premises without a warrant. The issue is fully discussed in the opinion of the court below, on which we rely.

The present case is virtually identical on the consent and inspection-without-a-warrant question to *United States* v. *Hammond Milling Co.*, 413 F. 2d 608 (C.A. 5), certiorari denied, 396 U.S. 1002; see also *United States* v. *Alfred M. Lewis, Inc.*, C.A. 9, No. 24,095, decided July 10, 1970, pending on a petition for a writ of certiorari, No. 511, this Term.[1] There is no conflict with *United States* v. *J. B. Kramer Grocery Co.*, 418 F. 2d 987 (C.A. 8), and *United States* v. *Stanack Sales Co.*, 387 F. 2d 849 (C.A. 3), relied on by petitioner, where the courts found, in different circumstances (see Pet. App. A, 14, n. 7), that the consent given was not voluntary but a submission to authority. Cf. *Bumper* v. *North Carolina*, 391 U.S. 543.[2]

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[1] We are providing petitioner's counsel with a copy of our memorandum in opposition in No. 511.

[2] It is not clear whether the principle of *See* and *Camara*—that absent consent a warrant is required—is applicable to Food and Drug inspections. Compare *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72; cf. Brief for the United States in *Colonnade*, p. 27, n. 23; memorandum in opposition in *Alfred M. Lewis, Inc.*, *supra*. The Food and Drug Administration has, in any event, promulgated regulations providing that its inspectors should obtain a warrant where consent to search is refused.

The court below properly rejected petitioners' contention that their prosecution was invalid because the Food and Drug Administration has not promulgated regulations indicating under what circumstances the agency would proceed criminally against those committing statutory violations. Whether a recommendation for criminal prosecution should be made in a particular case to the Attorney General or a United States Attorney (who must exercise their own discretion in determining whether to follow the recommendation) is a question to be resolved solely within the discretion of the agency based upon its evaluation of all the facts before it. Cf. *United States* v. *Kordel*, 397 U.S. 1, 11. There is no indication of any abuse of such discretion in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1970.

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